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'UNITED STATES GOVERNMENT
MEMORANDUM

DOCKET FILE COPY ORIGINAL

DATE: December 20, 1994

FROM: Linda Dubroof, Acting Chief, Domestic Services Branch

SUBJECT: CC Docket No. 92-90

TO: Office of the Secretary

Please add the attached informal comments to the above-referenced docket.

EX PARTE OR LATE FILED

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DAVID H. MOULTON
CHIEF COUNSEL AND STAFF DIRECTOR

U.S. House of Representatives

Committee on Energy and Commerce

SUBCOMMITTEE ON TELECOMMUNICATIONS AND FINANCE

Washington, DC 20515-6119

December 19, 1994

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

The Honorable Arthur Levitt
Chairman
Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549

Dear Chairman Hundt and Chairman Levitt:

As you may be aware, the majority staff of the Subcommittee on Telecommunications and Finance has been investigating compliance with the Telephone Consumer Protection Act of 1991 (TCPA) by the securities industry. The issuance of the enclosed report, which is a follow-up to the Subcommittee majority staff's July 1994 report on the telemarketing industry's compliance with the TCPA and FCC rules implementing that law, completes the staff's investigation.

I call your attention to the report's conclusions, summarized on pp. iii-iv, that, among other things, the rules adopted by the FCC are not working, because they are not providing adequate protection to consumers, and urge the FCC to reexamine the issue of creating a national "do-not-call" database as an effective alternative. Subcommittee staff also found two disturbing patterns in the written policies of numerous broker-dealers that have the effect of minimizing "do-not-call" requests.

I respectfully request that you make this letter part of the record and share it with your fellow Commissioners. Thank you for your consideration and cooperation in these matters. If you have any questions, please feel free to call me or have your staffs call Gerry Waldron or Jim Daly at (202) 226-2424.

Sincerely,

Edward J. Markey

Edward J. Markey
Chairman

Enclosure

cc: The Honorable Jack Fields, Ranking Republican Member

Letter to Chairman Reed Hundt from Hon. Edward Markey, Chairman, Subcommittee on Telecommunications and Finance, House Committee on Energy and Commerce, December 20, 1994.

"Report Card on Compliance with the Telephone Consumer Protection Act of 100 by Top Retail Firms in the Securities Industry and Self-Regulatory Organizations", Majority Staff Report, Subcommittee on Telecommunications and Finance, House Committee on Energy and Commerce, U.S. House of Representatives, December 1994.

REPORT CARD
ON COMPLIANCE WITH THE
TELEPHONE CONSUMER PROTECTION ACT OF 1991
BY TOP RETAIL FIRMS IN THE SECURITIES INDUSTRY
AND
SELF-REGULATORY ORGANIZATIONS

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A MAJORITY STAFF REPORT

prepared for the use of the

SUBCOMMITTEE ON TELECOMMUNICATIONS
AND FINANCE

of the

COMMITTEE ON ENERGY AND COMMERCE

U.S. House of Representatives

December 1994

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Summary

Unsolicited telemarketing calls, or "cold calls," made by stockbrokers to potential investors constitute standard procedure in the securities industry.[1] They are widely regarded and widely used as a business development technique to encourage and promote business relationships. Indeed, some 75,000 stockbrokers make 1.5 billion telemarketing calls a year, for an average of 80 calls per stockbroker per business day.[2] Information provided by a handful of top retail firms with aggressive telemarketing programs generally confirms these figures. At the same time, however, these figures and numerous consumer complaints serve to underscore that for many people, unsolicited telephone calls have become a daily annoyance. Because broker compensation is largely commission-driven, the intense competition among firms to sell their products leads to 6 million calls a day.

As a follow-up to its July 1994 report on compliance by the telemarketing industry with the Telephone Consumer Protection Act of 1991 (TCPA) and corresponding Federal Communications Commission (FCC) rules, and in order to assess compliance by another major U.S. industry where telephone marketing plays a significant role, the Subcommittee on Telecommunications and Finance conducted a similar survey of the "Top 50" retail broker-dealers in the securities industry. Staff analysis determined that the securities industry achieved a higher level of technical compliance with the TCPA and FCC rules than the telemarketing industry, although the analysis also found significant room for improvement in certain areas.

Based on its investigation, staff issued a report card graphically illustrating the survey results (see p. v). The securities industry received superior marks for having developed policies and procedures for maintaining a "do-not-call" list (DNCL). However, the securities industry as a whole earned a failing grade in one key area of compliance with the law, training of employees to maintain a DNCL. In addition, staff found two disturbing patterns in the written policies of numerous firms: 1) an effort to keep "do-not-call" requests to a minimum by requiring called parties to employ strict and excessively narrow or formalistic language in order to be placed on a firm's DNCL; and 2) the use of non-registered telemarketing personnel to make unsolicited calls without providing for these personnel to add individuals who do not want to be solicited to a firm's DNCL.

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[1]See, e.g., "Cold Calls, Hot Stocks and Bad Brokers," *New York Times*, Sept. 24, 1994, at 31.

[2]See graphic accompanying "Lawmakers Are Hoping to Ring Out Era Of Unrestricted Calls by Telemarketers," *Wall Street Journal*, May 28, 1991, at B1.

Though neither tactic may violate the letter of the FCC's regulations, both clearly violate the spirit of the law's intent. Requiring consumers to recite the information-age equivalent of "Abracadabra!" to get on a "do-not-call" list is clearly anti-consumer behavior. In the English language, "Don't call me again!" means "Don't call me again!" It is time that broker-dealers -- and telemarketers guilty of the same practice -- understood this and ceased their linguistic shenanigans.

While these patterns help to explain the low numbers of names on many firms' DNCLs, staff likewise found independent evidence from yet a second industry that consumers really do mind being bothered at home: an astonishing 2.8 million names on one parent corporation's DNCL, which compares with the astonishing totals of names on some companies' DNCLs in the telemarketing industry (2.3 million, 3.4 million, and 5.35 million). In other key areas, the industry earned average to above-average grades, and achieved a C/C-plus (C/C+) for effort.

Notwithstanding these marginally better results, the present investigation sustained staff's conclusion reached in the previous report -- that company-specific "do-not-call" lists are ineffective. In addition, this analysis buttresses the earlier recommendation to the FCC: reexamine the issue of creating a national database. Staff believes that a national database, while not a panacea, will better serve the needs of businesses in any industry that heavily relies on telephone solicitation as a significant development tool, than the bewildering welter of thousands of individual DNCLs that now reigns; and, more importantly, better safeguard the privacy rights of millions of individual citizens that are regularly and continuously infringed by unwanted telephone sales calls. This report also challenges the securities industry, among other things, to support this recommendation.

In addition, the Subcommittee surveyed nine (9) self-regulatory organizations (SROs) concerning what steps they had taken (or were planning) to educate member firms and their RRs about the requirements of the TCPA and FCC rules prescribed thereunder. Most SROs noted that because they are not the designated examining authority (DEA) for the sales practices of their member firms, they would not normally be directly involved in issuing regulatory bulletins. On the other hand, several SROs either augmented their educational efforts or implemented new initiatives in response to the Subcommittee's inquiry. The District 1 office of the National Association of Securities Dealers acknowledged that cold calls have become a problem.

Subcommittee staff welcomed several steps taken or planned by the SEC, as part of its general sales practices initiative, to promote pro-consumer awareness and consumer-friendly sales practices in the securities industry.

REPORT CARD

Key Subjects	Grade
Firms' procedures for maintaining "do-not-call" list.	A+
Firms' training of employees to maintain "do-not-call" list.	F
Firms' written policy for maintaining "do-not-call" list.	C

Overall Grade	
Securities industry compliance with TCPA	C/C+
Effort	C/C+

For explanation of grading, see following comments.

Background[3]

In order to protect the privacy rights of telephone consumers while permitting legitimate telemarketing practices, Congress passed the Telephone Consumer Protection Act of 1991 (TCPA) and ordered the Federal Communications Commission (FCC) to develop rules to implement this law.[4] The resulting FCC rules, which went into effect on December 20, 1992, impose a number of requirements on all commercial telemarketing companies. These requirements include, *inter alia*, the obligation to: 1) Maintain lists of residential telephone subscribers who do not wish to be called; 2) Formulate and distribute a written policy for maintaining "do-not-call" lists; 3) Inform and train their personnel in the existence and use of such a list in order to ensure compliance with these regulations by all employees of the telemarketing companies; and 4) Restrict telephone solicitations to residential telephone subscribers to the hours between 8 A.M. and 9 P.M. (local time at the called party's location).

To assess compliance with the provisions of the TCPA by the telemarketing industry, the Subcommittee surveyed the "Top 50" U.S. telemarketers on what steps they had taken concerning implementation of that law and corresponding (FCC) rules. On July 15, 1994, the Subcommittee released, in the form of a report card, a majority staff report on the results of the survey (July 1994 Report). The telemarketing industry as a whole earned failing grades in two key areas of compliance with the law -- inadequate or nonexistent written policies and inadequate or nonexistent training materials -- and achieved a C-minus (C-) for effort. Among other things, Subcommittee staff found: 1) nearly twenty percent (20%) of companies responding to the Subcommittee's questionnaire had no written policy for maintaining a "do-not-call" list, as they are required by law to have available upon demand, seventeen months after the FCC rules took effect; 2) numerous companies had inadequate or nonexistent training materials for training employees to maintain a "do-not-call" list; and 3) thirty-five percent (35%) of the companies

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[3]This report on the securities industry builds on the majority staff report on compliance with the TCPA and FCC rules by leading companies in the telemarketing industry, which was issued in July 1994. "Report Card on Compliance with the Telephone Consumer Protection Act of 1991 by Top Companies in the Telemarketing Industry: A Majority Staff Report Prepared for the Use of the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, U.S. House of Representatives" (hereafter, July 1994 Report).

[4]For the legislative history of the TCPA (Public Law 102-443 [S. 1462, H.R. 1304]), see July 1994 Report, at 1n.1; for a review of the judicial challenges to this law, see at 1n.2.

surveyed did not maintain an internal "do-not-call" list.

The July 1994 Report also made numerous recommendations to the FCC and the telemarketing industry. For example, the report recommended that the FCC should reexamine the issue of creating a national "do-not-call" database, because the current policy of company-specific "do-not-call" lists is ineffective. The report raised the question whether additional steps need to be taken not only by the telemarketing industry to achieve a higher degree of compliance with the TCPA and FCC rules, but also by the Commission to effect such compliance.

In addition, in a separate letter that grew out of its investigation, the Subcommittee recommended to the local exchange carriers (LECs) that in their monthly statements to consumers, they periodically provide information about handling unwanted telephone solicitations. Many companies acted upon this recommendation.

Scope and Methodology

As a follow-up to the July 1994 Report and in order to assess compliance with the TCPA and corresponding FCC rules by another major U.S. industry where telephone marketing plays a significant role, on July 28, 1994, the Chairman of the Subcommittee on Telecommunications and Finance asked the "Top 50" retail broker-dealers in the securities industry to provide detailed information on what internal steps they had taken regarding implementation of that law. These companies were selected from a list compiled by the Securities Industry Association (SIA) and published in the *Securities Industry Yearbook 1993-94* (*SIA-Yearbook*). The *SIA-Yearbook* ranked companies on the basis of their total number of retail registered representatives (RRs). Two adjustments were made to the list: 1) excluded from the "Top 50" were two foreign-owned and foreign-based firms; and 2) included, for purposes of serving as a control, was one institutional brokerage. These adjustments left a total of forty-nine (49) firms from which the Subcommittee sought information.[5]

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[5]In this connection, it is worth noting that forty-four (44) broker-dealers that were ranked among the "Top 50" retail firms for 1993-94 also were ranked among the "Top 50" retail firms for 1994-95, as published in the *SIA-Yearbook 1994-95*. No firms in 1993-94 were listed as tied, but four firms in 1994-95 were. In both years, the chief criterion for ranking firms, the number of retail RRs, remained unchanged.

Special circumstances may have contributed to the failure of some firms to be included on the 1994-95 list; for example, merger with another firm and consequent loss of corporate

All forty-nine (49) firms responded to the survey. Of this number, staff found six (6) firms to which the provisions of the TCPA and FCC rules did not apply, thus leaving a total of forty-three (43) for purposes of analysis and statistical comparison.[6] Although the small number of broker-dealers that responded ordinarily may suggest that caution be exercised in drawing firm conclusions concerning industry compliance with the provisions of the TCPA and FCC rules, this concern is nullified by the fact that the companies surveyed include by far the largest in the industry.[7] For instance, the nine (9) largest broker-dealers collectively have approximately forty-nine percent (49%) of all public customer accounts in the United States. In this connection, staff also has kept in focus the argument that only a small number of firms and individuals in the securities industry engage in abusive cold-calling practices and bring the entire industry into disrepute through the negative public perceptions and skepticism they generate.

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identity.

[6]The six (6) firms not affected by the law fell into three categories: 1) Three (3) were discount brokerages, with all orders entered through these companies being unsolicited. These firms do not engage in telephone solicitation, as defined by the TCPA, or maintain telemarketing operations. Their employees are prohibited from soliciting or cold-calling residential telephone subscribers who are not currently clients of their firms, in order to induce these persons to do business with them. 2) One (1) firm was the institutional brokerage mentioned above that served as a control. 3) Two (2) were firms that for different reasons have chosen not to engage in making telephone cold calls, although, paradoxical as it may seem, one of these firms in fact maintains a telemarketing operation. Except as specifically noted below, therefore, these six (6) firms are not included in the tabulated results.

[7]To give preliminary perspective, one firm that ranked among the top twenty (20) brokerages reported that its telemarketing force of approximately 221 registered cold callers makes approximately 165,750 to 221,000 calls each week, or an astonishing <u>150 to 200 calls per registered cold caller each day</u>, to potential investors. See further below, pp. 22-25, analysis of firms' responses to Question 7 of the Subcommittee's survey.

I. Findings

As a group, the "Top 50" retail broker-dealers, the largest retail broker-dealers in the industry, earned an overall grade for compliance of C/C-plus (C/C+). The staff views this grade as not only fair but as erring on the side of extending the benefit of the doubt to the industry. How the industry earned its average to above-average grade is explained below.[8] Securities firms that engaged in telemarketing for the most part maintained their own "do-not-call" list or in-house DNCL. This fact not only had a significant bearing on the high degree of technical compliance with the provisions of the TCPA and FCC rules. It also served to distinguish them from numerous telemarketing companies examined in the July 1994 Report.[9]

The staff investigation found that most firms obligated to comply with the provisions of the TCPA and corresponding FCC regulations are making an effort to meet the requirements of the law. Larger, well-known firms, particularly those in the first tier of "Top 50" noted above--for example, A.G. Edwards, Inc., Merrill Lynch & Co., and Smith Barney Shearson, Inc. -- included complete, written policies and pro-active training materials in their responses. But full compliance with the TCPA and FCC rules also characterized the responses of lesser known firms, for example, First Investors Corporation. Unfortunately, a large number of firms fell far short of this standard.

Among the more striking findings to emerge was the

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[8]Because of the highly competitive nature of the securities industry, and as requested by several firms, staff has accorded full confidentiality to all documents submitted, including cover letters. In this regard, staff also has taken the view that all information provided is proprietary in nature and constitutes a valuable trade secret or method of doing business, the disclosure of which may produce an adverse impact on firms, and thus has been at pains to treat firms' responses in generic fashion in analyzing and discussing survey results.

[9]See, for example, pp. 17-20, 22. In this regard, it is worth noting that although responses from approximately ten (10) firms arrived considerably after the deadline for their receipt, August 15, 1994, with several arriving as late as early to mid-November, staff experienced only a fraction of the difficulties in collecting data on retail firms as it did with the "Top 50" telemarketing companies (see July 1994 Report, p. 4). Internal procedures for routing the Subcommittee's request for information peculiar to these firms resulted in delays, rather than, for example, outright refusal to furnish information, as with two telemarketing companies.

unexpected confirmation of the sheer volume of telephone cold calls made by broker-dealers and the equally unexpected but refreshingly candid confirmation by a self-regulatory organization that this extraordinary volume has become a problem. Analysis of firms' responses to Question 7 below corroborates the first point, while the *National Association of Securities Dealers District 1 Newsletter* of June 1994 bears out the second. The opening sentence of "Cold Calling Rules," an article contained in the newsletter and distributed to approximately 3,500 main and branch offices of all member firms located in northern California, northern Nevada, and Hawaii, states:

> The NASD has received numerous complaints from customers regarding the receipt of cold calls from member firms.

As a public service to both public customers and its member firms, the newsletter provides a detailed summary of the FCC requirements and notes the applicable NASD by-laws. Additional concerns and deficiencies are treated below.

Finally, from its analysis of written policies, training and other materials -- for example, memoranda to branch managers -- provided by firms, staff found several instances in which RRs were discouraged from volunteering information about how consumers can have their names added to a firm's DNCL, in effect, to keep the number of names as low as possible. In this regard, some securities firms shared the same disturbing characteristic with several telemarketing companies in the July 1994 Report, the use of excessively narrow language in which to "disposition" calls in order to reduce DNC requests.[10] The following excerpt from one brokerage's written policy will illustrate this syndrome:

> [P]lease emphasize that merely because a customer instructs a Registered Representative that he or she should never again call such person, it should not be assumed that the customer's name should automatically be added to the 'Do Not Call' list. Names should only be added to the Do-Not-Call list if the customer explicitly directs the RR to add his or her name to the list [or] if the customer clearly states that no one at X (firm name) should ever again call him or her. Failure to observe these common sense rules will result in the creation of a massive (emphasis supplied), unwieldy firm Do-Not-Call list in a rather short period of

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[10]See pp. 6-7. The operative or triggering words in these companies' policies often are "specifically requests," or some variation thereof. Thus, a telephone sales representative would "disposition" a call as a "refusal" or something else instead of a "do-not-call" request, unless the customer "...**specifically requests**" that he or she not be called by Company J again.

time.

While this statement implicitly confirms the annoyance consumers experience with unwanted telephone solicitations and the difficulties they face in having their names added to company-specific DNCLs, it also betrays a strong anti-consumer bias. A better policy would be to have the RR use common sense in assuming that this is what the consumer wants and proceed accordingly. In no case, did a firm adopt a pro-active stance and instruct its RRs to volunteer this information to consumers.[11] More importantly, however, the written policies or other documents submitted by some leading companies in two industries that heavily rely on telemarketing evidence a clear effort to minimize DNC requests.

A. Training Materials Lacking

In both this and the previous investigation, an important area identified is training materials. Educational materials are clearly very important in providing continuity for dealing with DNC requests. In his survey letter, the Chairman specifically requested that firms furnish copies of such documents or scripts used in educating employees with regard to the DNCL (see below, Question 3). On this component of their overall grade, the securities industry as a whole failed, earning an F. A substantial majority of firms submitted inadequate materials or no materials or, in many cases, admitted that they did not use written training materials and thus had none to submit. Staff concluded that training of RRs in the requirements of the law and FCC rules tended to be perfunctory at best and for very many firms inadequate to poor.

Moreover, numerous firms did little to inform their RRs of the TCPA beyond issuing a compliance bulletin that also functioned as their written policy and was distributed at the time of hire. Only a small fraction of firms offered continuing education to their employees on this subject. Similarly, only a relative handful of firms provided copies of training materials separate and distinct from their written policy.

B. A Loophole in Firms' Written Policies

A second disturbing trend to emerge from an examination of firms' written policies centered around the widespread practice of firms employing non-registered telemarketing personnel to make

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[11]One firm, Citicorp Investment Services, however, approaches this pro-consumer desideratum in requiring its RRs, associated persons, and agents "to listen carefully for such [*sc.* DNC] requests and...to confirm such requests with any individual who even infers [sic] a desire to be placed on the List."

what at base are unsolicited sales calls -- for example, to advertise a financial-planning seminar or inquire if the called party would like to receive literature or speak to an RR -- but without providing for these non-registered telemarketers to add individuals who do not want to be solicited to the "do-not-call" list (DNCL). In essence, the numerous firms that have adopted this practice are skirting, if not *evading*, the law and the FCC rules concerning cold calls. This trend may account for the low numbers of names on many firms' DNCLs. By having non-registered telemarketers make preliminary screening calls, firms have fewer individuals requesting DNC status and, correspondingly, fewer reporting requirements.

Several examples will illustrate and support these contentions. Two firms in their written policies employ nearly identical language to define a cold call as "... virtually any unsolicited call to a person who is not an existing client of yours," which includes, but is not limited to, "... offering research reports, prospectuses or other information regarding investing or investments ...." Other types of cold calls include invitations to attend special seminars or receive special brochures and the like. A document summarizing compliance regulations provided by a third firm states:

> Anyone from the firm who is making any type of call which could be construed as a sales call should consult this list [DNCL] before dialing .... There is a difference between what is considered a "sales call" by the FCC and what is considered a "sales call" in the securities industry. Calls inviting an individual to an event where a sales presentation may be made is [sic] considered a "sales call" for FCC purposes.

While both definitions differ little concerning what constitutes a cold call, the second excerpt imposes broader and stricter limits on both the nature of cold calls and, significantly, who can make them. It is this latter aspect -- who can engage in telephone solicitation -- that numerous firms appear to have exploited in their written policies, when it comes to adding names to a firm's DNCL. For example, firms that permit RRs to have cold-calling personnel assisting them typically fail to stipulate in their written policies that these qualifiers -- or non-registered screening personnel or telemarketing assistants or non-Series 7 personnel or whatever they may be called -- also must adhere to the same regulations as RRs in honoring DNC requests. Instead their written policies stipulate, where any stipulation at all is made, that RRs are responsible for ensuring that these assistants are adequately trained in applicable procedures and policies. This failure offers a broad loophole to be exploited and may explain the strikingly low totals of names on many firms' DNCLs.

To be sure, the written policies of some firms display excruciating effort to specify what activities are permissible to unregistered cold-calling assistants. However, as the following excerpt illustrates, such exactitude frequently does not extend to the fact of the unsolicited telephone call itself:

> Unregistered persons may be utilized for the purposes of introducing a registered person to the prospect or arranging for an appointment between the prospect and the registered person. However, unregistered "cold callers" may not qualify leads or have any substantive conversation with the prospect. The only permissible function of such persons is to introduce the [RRs] or to make an arrangement for the [RRs] to call back at a later time. All unregistered cold callers must be full or part-time employees of [Y].

From this excerpt, it can be seen that Firm Y's policy sidesteps key provisions of the FCC rules, particularly regarding initiation of a potentially unwanted telephone call. Such evasion -- whether intentional or not is impossible to determine -- characterizes the written policies of numerous firms that employ non-registered personnel to make qualifying or pre-screening cold calls. Because this practice, which is widespread in the securities industry, is subject to abuse, firms need to review and tighten both their written policies and, where applicable, cold-calling scripts, so that all unregistered cold-calling personnel -- secretaries, other assistants, outside telemarketers hired by RRs and compensated through a firm's payroll or bonded temporary agency -- also are subject to complying with the TCPA and FCC rules. Currently, in many instances they are not. In addition, the appropriate regulatory agencies, the FCC and the SEC, should ensure that such compliance occurs.

C. Lists and List Brokers

A third and more noteworthy trend to emerge from staff's investigation concerned the heavy reliance that firms placed on external calling lists and the separate list-marketing industry spawned by their reliance. This trend needs to be understood because it underscores the carefully constructed invasions of privacy that have become constant in one's life. The following details of how one retail brokerage's telemarketing operation works illustrated staff's concern.

Firm ZZ in its extensive written policy discussed at length how its prospecting system provides quality, pre-scrubbed leads on-line, which are scrubbed weekly to remove "do-not-calls." In purchasing leads from various list vendors, ZZ's marketing department notes that "[a]nalysis of lists have [sic] shown that about 35% of unscrubbed lists are wasted because they contain 'do-not-calls', existing clients and duplicate names." Each week

RRs receive between 50 to 250 clean leads, over which each RR exercises proprietary control for three to six months. A lead that does not become a client is recycled to another RR. Special functions of the prospecting system include mail follow-up, result tracking, lead selection, callback ticklers, etc.

Leads and use of Firm ZZ's prospecting system cost an RR $.15 per lead pretax, so that 150 leads per week for a full year cost $1,200 pretax. In addition, elsewhere in the document ZZ described processing costs to be charged to RRs to have lists scrubbed and delivered on-line, choice of formats and costs associated with them, and **turnaround time for lists ranging from 5,000 to 100,000 names** (emphasis supplied).

Although opinions will differ concerning the efficacy of the elaborate procedures summarized above, staff took some comfort from the fact that in developing these procedures Firm ZZ paid close attention throughout to removing those individuals who had requested DNC status from the lists. Related to the widespread use of telemarketing lists by retail broker-dealers and the continuing search for fresh prospects that use of such lists entails, staff found, is the growth of an entire list-marketing industry to serve the needs of securities industry telemarketers. For example, the classified section (pp. 106-17) of the November 1994 issue of *Registered Representative*, an industry publication, contained no fewer than fifteen (15) advertisements for sales leads. Set in large, bold-faced type, many advertisements trumpet their wares: "9 Million Businesses"; "90 Million Households"; "Day-Or-Night Phones"; "100% verified phone #'s, unhammered"; "ESTABLISHED AFFLUENTS AT HOME & OFFICE"; "Continuous Cleansing Process"; "RADIO & T.V. CALL IN's"; "STATE SELECTS or OMITS"; "***affluent seniors with CDs***" (emphasis added); "internal corporate phone directories of Fortune 500 companies." Finally, one advertisement opens with the following teaser: "Why do so many brokers leave the business within the first two years? Mainly because of the difficult effort to continually find worthwhile daytime leads."

In addition, the magazine itself elsewhere (p. 80) publishes two advertisements promoting its own products, "The Telephone Prospecting Trilogy" and "The Right Stuff," with come-ons such as: "How to Sound Like a Million Dollars Over the Phone"; "How to Land Prospects Over the Phone"; "Prepare for cold call combat with this specially priced audio-video package"; "Times and products may have changed, but the telephone still remains the retail broker's top prospecting tool." Finally, a full-page advertisement (p. 39), featuring a photograph of an individual dubbed "The Cold Call Cowboy," touts an eight-month series of regional seminars and dates on prospecting.

That unwanted telephone solicitation by stockbrokers has grown to be a significant problem for some also can be seen in

the burgeoning of de-listing services. For example, Dun and Bradstreet Information Services (DBIS) offers two options to businesses that do not want their names on marketing lists: 1) limited de-listing from marketing lists furnished to stockbrokers; and 2) general de-listing from the company's master marketing file.[12] General de-listing, which results in removal from marketing lists and directories generally, is comparable to an individual having an unlisted telephone number, and implies a very strong negative reaction to unwanted cold calls. From correspondence and telephone conversations with representatives of DBIS, staff ascertained that businesses prefer the first option, limited de-listing from lists licensed to stockbrokers. **In the company's experience, unsolicited calls from stockbrokers account for most requests for de-listing** (emphasis supplied). When asked for the number of names on its business DNCLs, however, DBIS declined to divulge the information, on the grounds that it was proprietary and could be useful to competitors that also furnish lists.[13]

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[12]This service resembles the Direct Marketing Association's Telephone Preference Service List, except that DBIS collects and distributes information on businesses, as opposed to consumers.

[13]The Information Bureau in Garland, Texas performs a similar service, except that it eliminates individuals, as opposed to individuals and their companies, from lead information purchased by retail broker-dealers. As of the date of this report, this company's prospecting list contained approximately 400,000 names.

II. Recommendations and Rationale

Drawing on the detailed analysis of responses from the securities firms surveyed -- which follows this section -- and, in part, on continuing constituent complaints to elected officials, this report makes two sets of recommendations -- first, to the FCC, and second, to the retail securities industry.

A. Recommendation to the FCC

The FCC should create a national "do-not-call" database. The Commission should turn over to the private sector, by means of a public auction or other appropriate means, the job of operating and maintaining this national list.

Staff now has examined the compliance record of over one hundred leading companies in two major industries of vital importance to the American economy, telemarketing and securities, with the TCPA and FCC rules. In light of this effort, the recommendation advanced in the July 1994 Report, that the FCC should reexamine the issue of creating a national database -- with a tentative nod in favor of establishing a national DNCL -- has been changed to read that the Commission should use the authority granted to it by Congress to do precisely that, establish a national DNCL. What emerges clearly from both the present examination and the July 1994 Report is that the rules adopted by the Commission to implement the TCPA have proved ineffective at best and anti-consumer and, paradoxical as it may sound, anti-business at worst.[14]

As written, the FCC rules are not consumer-friendly, because they require consumers who may receive hundreds of unwanted telephone solicitations from hundreds of different companies to request that their names be placed on hundreds of different company-specific lists.[15] That the effort to achieve this goal is both enormously time-consuming and unproductive requires no elaboration. What is more, these hundreds of unwanted telephone solicitations, which under the current FCC rules citizens are essentially powerless to do anything about, serve only to increase feelings of frustration on the part of citizens and to

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[14]See July 1994 Report, pp. 12, 15-16.

[15]As described in the July 1994 Report (see pp. 8-9), under current practice, a consumer's request not to be called on company A's list does not transfer to company B's calling list; which is to say, a consumer's request does not result in a global exemption. But both anecdotal evidence and telemarketing companies' written policies and procedures for collecting DNC requests demonstrate that a global exemption is precisely what consumers want.

foster in them negative sentiments both about the products or services offered by or on behalf of legitimate businesses as well as about the businesses themselves.

In creating rules that in essence require companies to pay no more than lip service in order to achieve compliance with them, and thus are inherently ineffective, the FCC has helped contribute to the skepticism that many hold about telemarketing.

Businesses themselves have argued that unexpurgated or unscrubbed lists are counterproductive, and waste valuable employee time and money.[16] That is because unscrubbed lists reduce the number of potential sales "hits" while increasing the amount of time spent on reporting requirements, recording the names of individuals who request "do-not-call" status. Of course, this is to say nothing about the millions of consumers on thousands of individual, company-specific DNCLs, whose names will *not* appear on vendors' lists used by RRs. Staff found numerous brokerages with written policies requiring their RRs, prior to initiating each telephone cold call, to verify new calling lists against their firm's in-house DNCL, which may be available to them on-line or in the form of a paper copy, if small enough, as in the case of many firms.

With telemarketers in any industry able to employ calling lists already verified against a national DNCL, they would be able to process more telephone sales calls, eliminate repetitive gestures such as checking in-house lists, and, significantly, cut down on reporting requirements. This is a win-win situation that increases the potential for profits and reduces costs at the same time. Telemarketers also could operate secure in the knowledge that they would be far less likely to annoy people who desire to safeguard their rights of privacy from unwanted telephone solicitations. Based on its review of the securities industry survey responses, the Subcommittee staff believes that considerable savings could result to the industry if a national DNCL were to be established.

The Commission should consider developing a plan that would allow several companies to share responsibility for operating and maintaining this database. This plan would bring marketplace efficiencies to what has become a chaotic and unworkable situation. In addition, the Commission should require all appropriate telemarketers to subscribe to this master suppression file, against which all subsequent new programs would be passed

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[16]See also above, p. 8, the statistic cited from Firm ZZ's written policy that approximately thirty-five percent (35%) of unscrubbed lists are wasted. See further the comments of telemarketing companies on the use of DNCLs, July 1994 Report, p. 23.

for suppression of new DNC requests from future calling.

In their comments before the FCC on implementation of the TCPA (see CC Docket No. 92-90), several companies and public-interest groups offered cogent arguments for why a national database remains the most practical and cost-efficient solution to the problems addressed by Congress in the TCPA and encountered by consumers in their daily dealings with telemarketers. The Commission, however, gave these arguments short shrift, dismissing them summarily after stating their gist.[17]

In view of the many drawbacks of company-specific "do-not-call" lists -- an inefficient, ineffective, and uneconomic means of avoiding unwanted telephone solicitations -- and in light of the strong interest in a national database, as attested, for example, by the millions of names on companies' DNCLs in two industries, staff has concluded that a national database is an effective alternative for protecting the privacy rights of telephone consumers while permitting legitimate telemarketing practices. The telemarketing industry has managed to engineer a cure worse than the putative disease. It is past time to adopt an effective remedy.

B. Recommendations to the Securities Industry

While staff concluded that overall securities industry compliance with the TCPA was slightly above average for telemarketers, staff also feels that there is significant room for improvement within the industry.[18] A direct route to achieving such improvement lies in realizing that adopting a pro-consumer approach toward telemarketing makes good business sense. Subcommittee staff found that some companies have made a genuine effort to promote compliance with and employee education about the TCPA.

Firms should provide greater opportunities for RRs to receive training concerning telemarketing laws and regulations, beyond what many RRs receive at the time of hire or during some firms' annual compliance review. In short, firms should place a higher premium on continuing education than staff's survey of

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[17]See *Report and Order in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, FCC 92-443, para. 11-15, at 7-10, and para. 20-23, at 13-15 (1992).

[18]For example, it goes without saying that, where applicable, firms should examine their policies with a view toward closing the loophole outlined in section I.B, which exempts non-registered personnel from DNC reporting requirements.

their telephone sales practices indicates they currently do. Related to this desideratum is the need for strict supervision and enforcement of regulations on the part of branch office managers, in particular, to prevent potential problems from developing. Regular training and supervision constitute the twin pillars for ensuring compliance with the letter *and* spirit of all applicable laws.

It behooves firms to heed the strong undercurrent of complaints made by consumers who remain either ignorant of or frustrated by both the TCPA and highly limited remedies available to them under the FCC's implementation of that law, but are even more frustrated about repeated and unwanted intrusions from telemarketers. For example, many citizens feel that the presence of a telephone in their homes leaves them victims to any marketer dialing their number to make a solicitation. Citizens hold the perception that little can be done to curtail the activities of telemarketers who call on behalf of both commercial and non-profit organizations, and want more regulation.

Finally, with the issuance of this report, the securities industry and the several vanguard firms with model procedures and written policies are presented with an opportunity to demonstrate genuine leadership by working to implement a national DNCL. Staff believes that firms that have taken the lead in developing strong TCPA education and compliance programs should encourage adoption of these "best practices" on an industry-wide basis. Staff also believes that industry trade associations, such as the Securities Industry Association (SIA), could serve as a useful forum for promoting improved telemarketing practices.

III. Detailed Analysis of Responses

Each respondent was asked the same six questions about what internal steps it had taken to comply with the TCPA and FCC rules, and a seventh question relating to the scope of its telemarketing operations, that is, the volume of telephone cold calls and the number of RRs engaged in telephone solicitation. Firms also were invited to furnish additional information showing their compliance with the law. The questions asked and the question-by-question summary analysis of brokerages' responses that follow illustrate and support the recommendations and conclusions drawn above.

Question 1

Unlike numerous telemarketing companies in the July 1994 Report, securities firms maintained their own or in-house DNCL. Because of this fact, industry responses to Question 1 in the Chairman's letter of July 28, 1994 tended to be uniform. Question 1 stated:

> Does your organization maintain a "do-not-call" list? When was it instituted? Who is responsible for maintaining such a list?

Thus, forty-two (42) companies reported that they maintain an internal or in-house DNCL.[19] This figure includes several companies that subscribe to the Florida Department of Agriculture and Consumer Services List (commonly referred to as the Florida Asterisk List [FAL]), the "Oregon List" (a similar computerized suppression file maintained by U.S. West, in accordance with the Oregon Telephone Solicitation Law), or the Direct Marketing Association Telephone Preference Service List (DMATPSL) and its quarterly updates, as a screen prior to any telephone solicitations.

Most firms instituted their DNCLs on or before the due date for compliance with the FCC rules, December 20, 1992, while a handful of firms brought their operations into compliance within a few months of the effective date. In the case of approximately half of all firms, staff found, either a compliance department or a marketing and sales department maintained the firm's in-house DNCL, each to an equal degree of twenty-five percent (25%). In the remaining fifty percent (50%) of cases, responses ranged from administrative to personnel to legal to data processing to branch administration departments.

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[19]Concerning the single firm that did not maintain an in-house DNCL, see discussion at Question 5 below, p. 18.

Question 2

Question 2: What mechanisms to collect telephone subscriber data for this "do-not-call" list do you have in place? How does one go about requesting to be put on your "do-not-call" list? Once a request is made, what steps are taken by your organization to ensure that the requesting party is not called again in the future?

Concerning this tripartite question, which encapsulates one of the key provisions of the TCPA, staff found that compliance was uniform. Most companies reported developing detailed procedures and many had incorporated them into their written policies. What is more, because all but one firm maintained an in-house DNCL -- as opposed to only sixty-five percent (65%) of telemarketing companies -- the securities industry in fact achieved a far higher level of compliance than did the telemarketing industry in the July 1994 Report. This procedurally strong compliance record is reflected in the grade of A-plus (A+) earned by the industry. In spite of this pocket of excellence, however, in the majority of cases staff found it difficult to escape the impression that firms all too often paid but perfunctory attention to their procedures.[20]

So, for example, sales personnel submit the names of individuals requesting DNC status to their branch office managers, who in turn submit this data to the department at corporate headquarters charged with maintaining the DNCL. This department updates the firm-wide list and distributes it to all branch employees. Turnaround time varies, ranging from a week to a month to a quarter to six months.[21]

Only a handful of firms have implemented an on-line data entry DNC system that enables their RRs and other employees, subject to review and approval by respective branch managers, directly to input DNC requests at their desktop terminals, so that they appear on the firms' systems. One firm also updates its DNCL in response to notices and letters from members of the public requesting DNC status. A second firm sends a letter of apology for contact with a client who, in the course of a telephone cold call by a firm RR, requests DNC status. The letter advises that the prospect's name has been removed from the firm's calling list and that should the prospect desire additional contact with the firm, he or she should initiate that contact. In staff's view, the additional pro-consumer steps

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[20]For reasons why staff formed this impression, see below, pp. 19, 22-24.

[21]For example, one firm subscribes to a software service that updates the firm-wide DNCL quarterly with new names and numbers.

taken by this firm to palliate an intrusive business practice can only help to leave a less unfavorable impression with the public, and, therefore, might be followed by other firms with profit.

Question 3

Question 3: When and how are your employees educated with regard to the list? Please provide the Subcommittee with any training materials or scripts used as part of the education process.

With regard to part one of this question, all forty-three (43) firms reported offering training to their employees. In numerous cases, however, this training consisted solely of a firm's written policy on the TCPA and FCC rules, as contained in a compliance manual distributed to all RRs at the time of hire. In addition, in some cases RRs are required to sign a form acknowledging that they have read the material. Staff believes that **RRs ought to be required to acknowledge their understanding of, and promise to follow, all applicable laws and regulations, including the provisions of the TCPA and FCC rules implementing this law, by signing a statement to that effect.**

Moreover, in numerous cases where firms submitted their written policies in place of training materials, these materials did not extend beyond a half-page in length and were inadequate concerning compliance issues. For example, some policies failed to stipulate that RRs, when initiating a cold call, must identify themselves and the name of their firm and provide their address and telephone number. Or they neglected to note the FCC restrictions on the use of facsimile machines, auto dialers or artificial or pre-recorded messages. Both qua training materials and written policies, then, these documents failed the test of adequacy.

Question 4

Question 4: If your telemarketing operations are not centrally located, how does your organization ensure that all of your offices do not call the individuals on the "do-not-call" list compiled at your office?

While responses to this question showed some variation, the vast majority of firms reported having a central DNC database accessible online to all sales personnel regardless of their location. Several firms distributed a weekly or biweekly publication of their DNCLs to their RRs; one firm printed and distributed a hard copy daily, a second firm distributed a semi-annual list, and a third firm distributed an annual list. As might be expected in an industry that places such a high premium on sales by individuals, in thousands of branch offices, many firms lacked a centrally located telemarketing department, indeed